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Supreme Court, U.S.
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No. 99-948

IN THE

Supreme Court of the United States

CLAUDE CIMINO, *et al.*,

Petitioners,

v.

PITTSBURGH CORNING CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

W. THOMAS MCGOUGH, JR.
REED, SMITH, SHAW, & MCCLAY
435 Sixth Avenue
Pittsburgh, PA 15219
(412) 288-3131

R. CORNELIUS DANAHER, JR.
Counsel of Record
DANAHER, TEDFORD, LAGNESE
& NEAL, P.C.
21 Oak Street, 700 Capitol Place
Hartford, CT 06106
(860) 247-3666

Attorneys for Respondent

157089

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

41pp

QUESTION PRESENTED

Whether the United States Court of Appeals for the Third Circuit Was Correct in Holding that the Judicial Panel on Multidistrict Litigation Did Not Abuse Its Discretion in Transferring Certain Asbestos Cases under 28 U.S.C. § 1407.

PARTIES TO THE PROCEEDING

The petitioners are approximately two thousand personal injury asbestos plaintiffs in the Eastern District of Texas. The case takes its name from one of those plaintiffs — Claude Cimino.

The respondent is Pittsburgh Corning Corporation — a defendant in the court below.

Pittsburgh Corning Corporation is owned by PPG Industries, Inc. and Corning Glass Works each of which holds a 50% shareholder interest.

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STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 15(2), the respondent hereby submits its own statement of the case because petitioners' statement of the case is incomplete and argumentative.

Cimino began when the United States District Court for the Eastern District of Texas issued orders on October 26, 1989 consolidating 3,031 personal injury asbestos cases for a three phase trial proceeding to commence on February 6, 1990. Phase I was to have been a common issues trial of liability and punitive damages. Phase II was to have been a trial of certain representative cases with the assessment of an omnibus award for all 3,031 cases. Phase III was to have been a non-jury proceeding (without involvement of defendants) in which the award would be distributed among the 3,031 plaintiffs. Only three months were allowed for discovery. Depositions were limited to 45 minutes per plaintiff and the defendants were required to bring medical personnel and equipment to Beaumont Texas to examine approximately 100 plaintiffs per day. Virtually all of these procedures were imposed on the defendants over their objection. The trial plan was challenged by a mandamus petition and invalidated by the Fifth Circuit in *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990) on the grounds that it exceeded the scope of judicial authority.

On remand, the plan was modified. At first, Phase I was to comprise a complete jury trial of ten plaintiffs and an attempt to determine certain "common" issues. Mid-way through these proceedings, however, the court (by order dated March 5, 1990), once again modified the plan. The new plan called for a Phase I full trial of ten plaintiffs followed by

Phase III "trials" of damages (but not exposure) to two separate juries as to 160 sample plaintiffs. Phase II (which was to follow Phase III) was to have been a trial on exposure not of individuals but by classes of plaintiffs at various times by craft, worksite (22 different sites) and time (in 10 year increments over 40 year period). Phase II was ultimately replaced by a limited stipulation, the express purpose of which was to facilitate appellate review[1]. The District Court thereafter extrapolated the results of the 160 sample cases to the remaining group of what had then become 2,128. Judgments were entered in nine cases which were fully tried, 143 sample cases, and five extrapolated cases.

The process of entering and reviewing these judgments was taking place in the District Court when the Judicial Panel on Multidistrict Litigation entered its order centralizing virtually all asbestos cases in 1991. *See In re Asbestos Products Liability Litigation (No. VI)*, 771 F. Supp. 415 (J.P.M.L. 1991).

Appeals were eventually taken from the final judgments. Because of the number and complexity of the appellate issues, the Chief Judge of the Fifth Circuit issued an order on December 15, 1993 providing for multiple appellate phases, if necessary. Pursuant to this procedure, respondent (appellant below) reserved certain issues to the second phase

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1. Without this stipulation, an appeal may have become impossible because of onerous bonding requirements. The amount in the 157 cases in which judgment was actually entered was approximately $69,000,000. The remaining extrapolation cases called for judgments in the approximate total amount of $1,300,000,000 for actual damages alone excluding prejudgment interest and punitive damages. *See Cimino v. Raymark Industries, Inc.*, 151 F.3d 297, 300 (5th Cir. 1998).

if necessary. One of these issues was the appropriateness of class action certification.

The second phase of the appeal became unnecessary. Relying in part on its reasoning in *Fibreboard*, the Fifth Circuit in *Cimino v. Raymark Industries Inc.*, 151 F.3d 297 (5th Cir. 1998) invalidated all but Phase I of the trial and reversed the judgments in all the Phase III and extrapolation cases. A principal basis of the Fifth Circuit's decision was that the trial plan deprived the defendant of a right to a jury trial by dispensing with the requirement of proof of causation. The Fifth Circuit also commented as follows with respect to certain contested Phase III and extrapolation case issues:

> we *pretermit* any consideration of any remaining claims of Pittsburgh Corning, and of any claims of error raised by plaintiffs in their cross-appeal as to Pittsburgh Corning, which relate solely to some or all of the phase III cases or some or all of the extrapolation cases or solely to both. Any other claims of Pittsburgh Corning, and plaintiffs on their referenced cross-appeal, we consider *solely* insofar as they pertain to the nine judgments in the phase I class representative cases.

Id. at 321. (emphasis added)

The suggestion to the Judicial Panel on Multidistrict Litigation that these remanded cases were appropriate "tag-along actions" followed shortly thereafter[2]. Conditional

2. Under Rule 1.1 of the Rules of Procedure of the Panel, a "tag-along action" is a civil action pending in a district court and involving common questions of fact with actions previously transferred.

Transfer Orders (CTO-139 and CTO-140) were filed by the Judicial Panel on November 25, 1998.

Prior to final action by the Judicial Panel, a complicated dispute ensued over the interpretation of the Fifth Circuit's 1998 opinion. The plaintiffs asserted that all but the exposure and extrapolation findings survived the original *Cimino* proceedings and that the liability findings from Phase I and the Phase III damages findings remained in effect. They also claimed that the 3 to 1 punitive damages multiplier extended automatically to every one of the over two thousand remaining cases. Plaintiffs sought confirmation of their views from the Fifth Circuit via a Petition for Panel Rehearing which was denied without opinion. The defendant, by contrast, asserted that the Fifth Circuit had been clear that it was not deciding any issues beyond those in the nine fully tried cases by virtue of the language wherein it stated that "we pretermit any consideration of any remaining claims of Pittsburgh Corning, . . ." *Id* [3].

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3. Although the Fifth Circuit rejected Pittsburgh Corning's challenge to the multiplier, its decision so doing was quite narrow. *Id.* at 323. This decision was expressly based on the multiplier as considered in the prior holdings of *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir. 1986) and *In re Fibreboard*, 893 F.2d 706 (5th Cir. 1990). There is a major difference between the *Jenkins* and *Cimino* Phase I informed multiplier and the blind multiplier of the *Cimino* Phase III and extrapolation cases. The proposed procedure in *Jenkins* (as endorsed in *Fibreboard*) provided that any punitive damages would be awarded only after all class members' actual damages claims had been determined and after a special master had surveyed the class and prepared a report detailing the class members and their claims in order to apprise the jury of the gravity and extent of the absent members' claims and the typicality of the representatives' claims. *See Jenkins v. Raymark Industries, Inc.*, 782 (Cont'd)

In an Initial Case Management Order dated December 2, 1998, the District Court in Texas agreed largely with the plaintiffs on the issues in this dispute by holding that liability and punitive damage multiplier findings from the original proceedings would apply to the entire remaining group of 143 sample and 2,128 "extrapolation" cases. This Case Management Order provided for certain discovery and for trials to be held on causation and damages in 2,128 cases and on causation and perhaps damages in 143 cases.

In the meantime, proceedings went forward before the Judicial Panel on Multidistrict Litigation. On December 21, 1998, the plaintiffs filed a brief supporting the vacating of the conditional transfer orders. On January 11, 1999, the defendant filed opposition papers. On January 29, 1999, the Panel heard oral argument. It issued a decision transferring the cases 7 days later on February 5, 1999. The Panel found that there were common questions of fact with the asbestos cases previously transferred and that transfer will serve the

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(Cont'd)

F.2d at 471. Therefore, in *Cimino* Phase I, the jury knew all about the nine plaintiffs as to whom its punitive damages multiplier was affirmed. By contrast, however, the Phase I jury in *Cimino* knew virtually nothing about the thousands of plaintiffs as to whom the Phase III and extrapolation multipliers would have been applied. There is a difference between these two types of multipliers. Texas law provides that a jury may not award punitive damages when it knows nothing about the situation and sensibilities of the parties and the relationship of the defendant's conduct to the likelihood of harm of the plaintiff. *See Alamo National Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981); *Transportation Insurance Company v. Moriel*, 879 S.W.2d 10 (Tex. 1994). The endorsement of a blind multiplier would have presented a serious *Erie* problem and it is thus not surprising that the Fifth Circuit was content to "pretermit" the consideration of any such claim.

convenience of the parties and promote the just and efficient conduct of the litigation. It found that transfer was appropriate for reasons expressed by the Panel in its 1991 centralization order. *In re Asbestos Products Liability Litigation (No. VI)*, 771 F. Supp. 415 (J.P.M.L. 1991). It also found that the cases were "again in a pretrial status". The Panel indicated that it was not persuaded to depart from the centralization approach in dealing with these cases noting the success of the transferee Judge (Weiner, J.) of the Eastern District of Pennsylvania.

In response to the Panel's decision, the plaintiffs filed a petition for writ of mandamus in the United States Court of Appeals for the Third Circuit on or about March 15, 1999. The Court requested a brief from the respondent and held oral argument on June 22, 1999. On July 6, 1999, the petition was denied. The Court reiterated that the litigation was once again in a pretrial status. It held that the petitioners could show neither an abuse of discretion in the order of transfer nor a clear and indisputable right of remand. It further held that there remained many common issues of both fact and law, that transfer served the convenience of the parties and witnesses, and that judicial efficiency was amply served by the transfer. A petition for rehearing was denied.

This Petition followed[4].

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4. Copies of the opinions of the Third Circuit and the Judicial Panel on Multidistrict Litigation and the Case Management Order of the United States District Court for the Eastern District of Texas are appended to the Petition.

SUMMARY OF ARGUMENT

This Petition should be denied because the decision of the United States Court of Appeals for the Third Circuit does not conflict with that of any other circuit or involve an important question of federal law. The Third Circuit merely held that the Judicial Panel on Multidistrict Litigation did not abuse its discretion in transferring certain "tag along" asbestos cases to the Eastern District of Pennsylvania. Virtually all federal asbestos cases have been consolidated in multidistrict proceedings in the Eastern District of Pennsylvania for the last eight years. The transfer decision was a fact oriented one in an area where the scope of judicial discretion is particularly broad. The cases in question met all the criteria for transfer under 28 U.S.C. § 1407(a). The writ of certiorari does not exist for the purpose of second guessing the factual decisions of lower courts when determining whether or not there has been an abuse of discretion.

REASONS FOR DENYING THE WRIT

A writ of certiorari should be denied in this case for the following reasons.

I.

THIS CASE DOES NOT MEET THE CRITERIA FOR CERTIORARI

The criteria for the writ of certiorari are set out in Rule 10 of this Court. A petition for writ of certiorari is granted only for compelling reasons. In the case of the United States courts of appeals, a writ is generally granted only when the

court has entered a decision in conflict with that of another circuit on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this court's supervisory power. A writ may also be granted when the court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. A petition is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

The decision of the Third Circuit in this case does not meet any of these certiorari criteria.

There is no conflict among the circuits. The petitioners in this case are reduced to arguing that the decision conflicts with other decisions in what they refer to as the "lower" courts (Petition, pages 16-25). As will be seen more fully below, there is no such conflict at all. The majority of the so-called conflicting decisions are routine Judicial Panel on Multidistrict Litigation transfer denials. Such denials are a common and highly fact intensive phenomenon.

The Third Circuit's decision is not a departure from the usual course of proceedings or a decision on an important question of federal law that conflicts with the relevant decisions of this court or which should be settled by this court. The Third Circuit's decision was the denial of a mandamus petition. Mandamus is an extraordinary remedy

granted only in cases of abuse of judicial discretion[5]. Petitions for the writ of mandamus relating to Panel transfer orders are almost always denied for fact dependent reasons[6]. A decision not to transfer a case is not reviewable at all, 28 U.S.C. § 1407(e).

The Petition in this case fits squarely within the guidelines by which this Court does *not* grant petitions for certiorari. No rule of law was improperly stated. The "errors" asserted by the petitioners would relate primarily to the factual questions of whether there remain "common issues" to be tried, whether the cases are once "again in a pretrial status", and whether or not transfer serves the convenience of the parties and witnesses and is conducive to judicial efficiency. These are not the material of certiorari. The

5. *Mallard v. United States*, 490 U.S. 296, 309, 109 S. Ct. 1814, 1822, 104 L. Ed. 2d 318 (1989); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383, 74 S. Ct. 145, 148, 98 L. Ed. 106 (1953); *In re Chambers Development Co., Inc.*, 148 F.3d 214 (3d Cir. 1998); *Hahnemann University Hospital v. Edgar*, 74 F.3d 456 (3d Cir. 1996)

6. *See In Re Regents University of California*, 964 F.2d 1128 (Fed. Cir. 1992) (denying petition for writ of mandamus to vacate the Panel's order to consolidate five pending lawsuits involving recombinant DNA technology); *In re Ivy*, 901 F.2d 7 (2d Cir. 1990) (denying petition for writ of mandamus to vacate Panel's order transferring Agent Orange action); *Matter of New York City Municipal Securities Litigation*, 572 F.2d 49 (2nd Cir. 1978) (denying petition for writ of mandamus to review order of Panel transferring and consolidating cases involving federal securities laws). The only case identified in the proceedings below in which an extraordinary writ was issued to the MDL Panel was in a situation totally different from the case at bar. *See In re Food Lion, Inc. Fair Labor Standards Act Lit.*, 73 F.3d 528 (4th Cir. 1996) (Order issued to consolidate numerous remanded cases for a single appeal to avoid numerous appeals in various jurisdictions).

transfer order at issue was primarily a case management decision — a quintessential example of an area where the scope of discretion is broad.

It is hardly unusual to transfer asbestos cases to the Eastern District of Pennsylvania. Virtually all such cases are handled in this manner since the centralization decision of the Judicial Panel in 1991. *See In re Asbestos Products Liability Litigation (No. VI)*, 771 F. Supp. 415 (J.P.M.L. 1991). The order in this case was little more than a reaffirmation of the 1991 centralization. The order in this case represented the judgment of no less than six Panel members and was based on long experience in the proper management of the asbestos dockets of the federal courts. It is inconceivable that they all joined together to commit an abuse of discretion.

II.

THE FACTUAL GROUNDS ASSERTED IN SUPPORT OF THE PETITION ARE INCORRECT

A. The Question Has Been Improperly Framed

Pursuant to Supreme Court Rule 15(2), respondent objects to consideration of the question as framed by the petitioners because the three so-called "facts" on which it is based are not an accurate reflection of what occurred at the proceedings below. Petitioners have chosen to weave their argument into their statement of the case. That argument, however, has been tested and found wanting for factual reasons at numerous previous levels of judicial review in this case.

The "QUESTION PRESENTED" as framed by the petitioners in this matter is as follows:

> Whether the Judicial Panel on Multidistrict litigation may direct the transfer of cases pending in a federal district court even when:
>
> - those actions are already in trial;
>
> - the common questions of fact and law have already been resolved in a prior phase of the proceeding; and
>
> - any remaining discovery or other pretrial matters involve individualized questions of fact that plainly should not be conducted in the multidistrict context.

These factual predicates are either inaccurate or incomplete. The cases are more accurately described as "pretrial" than "in trial" status. There are many common questions of fact or law which have not been resolved in prior phases of these proceedings. There remains considerable discovery and other pretrial matters that do not involve individualized questions of fact.

The true question presented is whether it was an abuse of discretion to transfer these cases in light of their unique facts. More technically, the question is whether the United States Court of Appeals for the Third Circuit was correct in holding that the Judicial Panel on Multidistrict Litigation did not abuse its discretion. This is a classic example of the sort of question for which a writ of certiorari is not

appropriate. This Court does not sit to second guess the factual findings of courts of appeal when they hold that the Judicial Panel on Multidistrict Litigation has not abused its discretion in making a case management decision.

B. These Cases are in a Pretrial Status

The Judicial Panel characterized these cases as "again in a pretrial status". It is this characterization rather than that of the petitioners which is most accurate.

In *Cimino v Raymark Industries, Inc.*, 151 F.3d 297 (5th Cir. 1998), the Fifth Circuit reversed all of these cases except the nine cases which were fully tried[7]. The Fifth Circuit pretermitted any consideration of claims of error as to the remainder. Although there is some dispute as to the manner thereof, there is no dispute that 2,271 cases remain to be tried. Although there is some dispute as to the extent thereof, there is no dispute that some discovery remains to be conducted. The Judicial Panel and the Third Circuit were eminently correct in characterizing the cases as being in a pretrial status.

C. There Are Many Common Questions of Fact or Law Which Have Not Been Resolved

1. Questions of Fact

The Third Circuit held that "There remain many common questions of fact in the *Cimino* cases". This holding was correct.

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7. The judgments in these nine cases have been fully satisfied.

Petitioners argue that there are no common questions of fact because the Phase I liability issues in *Cimino* have already been tried and apply to all the rest of the cases. This reasoning is incorrect for three reasons.

The Phase I findings do not apply to all the rest of the cases. The Fifth Circuit pretermitted consideration of this subject. At a minimum, this issue remains disputed.

Even assuming that the petitioners are correct as to the meaning of the Fifth Circuit's holding, there are many common factual issues of exposure, causation, and damages within the proceedings remaining to be conducted[8]. Most of these cases arise from refineries and shipyards where the environmental conditions were similar. This gives rise to numerous unresolved common issues such as exposure to the refinery and shipyard conditions, the damages factors relating thereto, the knowledge of the premises owners, the implementation of safety measures, the effect of other toxins, the impact of smoking, union knowledge and other similar information[9].

Finally, petitioners misconstrue the "common questions of fact" criterion. This criterion refers not to the similarity between issues in one case or group of cases but to the similarity between any one asbestos case and *all* asbestos cases. In its 1991 centralization order, the Panel properly

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8. In making this point, respondent does not disagree with petitioner that there are also many individualized questions of fact that need to be resolved.

9. There may be a greater realization of the impact of smoking now than in 1990.

determined that the criteria of 28 U.S.C. § 1407(a) were fulfilled and that there were sufficiently common issues among all asbestos cases that transfer to Judge Weiner of the Eastern District of Pennsylvania was appropriate. Among these were the large number of cases, the crowding of dockets, the length and delays of trial, high transactional costs, and the potential exhaustion of the assets of the defendants. *Cimino* has always shared and continues to share these characteristics. Indeed *Cimino* is a unique example of the disproportionate siphoning off of the assets of defendants to the Eastern District of Texas. The Panel correctly found that *Cimino* is appropriate for transfer today "for reasons expressed by the Panel in its original decision". Arguments *ab initio* against transfer on grounds of lack of commonality are thus unavailing. That issue was decided eight years ago.

2. Questions of Law

There are also important common questions of law yet to be resolved in these cases. The Third Circuit was correct to so note.

An example of an important unresolved legal question is the dispute between the parties as to whether liability and punitive damages issues remain to be tried. The petitioners maintain that the Fifth Circuit spoke to these issues and that only exposure and certain damages issues remain. The respondent maintains that the Fifth Circuit reversed outright the sample and extrapolation cases, pretermitted consideration of the disputed issues involving the remainder, and that its opinion has no effect outside the nine trial cases which were affirmed. The resolution of this issue will have

important ramifications for the future of these cases[10]. Another important unresolved common question of law is whether the class certification was proper. This was one of the issues respondent reserved on appeal to the Fifth Circuit. It was not necessary for the Fifth Circuit to reach this issue but it may be necessary to do so in the future. Yet another unresolved legal issue is a venue challenge based on the prejudicial publicity of the billion dollar award in a relatively small community.

D. There Remains Considerable Discovery and Other Pretrial Matters That Do Not Involve Individualized Questions of Fact

The defendants' opportunities for discovery at the time of trial were severely curtailed by the District Court's 1989 orders which contemplated a statistical sampling procedure rather than a real trial. As noted previously, only three months

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10. The parties also dispute whether the ruling on this subject by the United States District Court for the Eastern District of Texas is the law of the case. Respondent maintains that it is not. A transferee judge may reconsider decisions of the transferor judge. *See* Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts*, 78 F.R.D. 575, 577 (transferee judge may "modify, expand, or vacate prior orders of transferor court"); Wright, Miller, and Cooper, *Federal Practice and Procedure*, 1999 Supp., p. 876, § 4478: ("Following transfer of a case for consolidated multi-district proceedings under 28 U.S.C.A. § 1407, on the other hand, the underlying purpose of coordination and consolidation may justify special freedom to reconsider matter that otherwise might be the law of the case."); *In re Multi-Piece Rim Products Liability Litig.*, 653 F.2d 671, 676 (D.C. Cir. 1981) (transferee judge "has the power to set aside pretrial rulings of transferor courts"). Fed. R. Civ. P. 54(b) provides that a non-final decision is subject to revision at any time.

were allowed for discovery in over two thousand cases. Depositions were limited to 45 minutes per plaintiff. The defendants were required to bring medical personnel to Beaumont to examine approximately 100 plaintiffs per day. This limited discovery was not adequate to fairly evaluate the claims of all the plaintiffs or to prepare the issues for trial. It is thus not correct (as the petitioners claim) that the discovery still needed is limited to updated medical records or individual exposure data. There is a need for discovery on common issues such as the conditions at the refineries and shipyards, knowledge of premises owners and operators, the effects of other toxins, union knowledge and other similar matters. The sheer volume and complexity of what remains to be done suggests that it is likely that there will be other pretrial matter that does not involve individualized questions of fact.

III.

THE LEGAL GROUNDS ASSERTED IN SUPPORT OF THE PETITION ARE WITHOUT MERIT

Petitioners assert one theme and three specific arguments for granting the writ. All are without merit.

A. The Judicial Panel on Multidistrict Litigation Did Not Engage in an "Unprincipled Expansion" of its Power in This Case.

As their "central theme" in this case, petitioners assert that there has been an "unprincipled expansion of judicial power by the Judicial Panel on Multidistrict Litigation" (Petition, page 15). No authority has been cited in support of this proposition other than petitioners' dissatisfaction with

the result in this case. It is true that MDL treatment is appropriate only for pretrial proceedings. That is exactly what the Panel properly held these cases to be. Petitioners' theme also conveniently ignores the fact that both the Panel and the Third Circuit took special note of the procedures available for remand of individual cases should continued inclusion in MDL proceedings be deemed inadvisable.

Petitioners also assert that the decisions in this case conflict with *Lexecon Inc. v. Milberg Weis Bershad Hynes & Lerach*, 523 U.S. 26, 118 S. Ct. 956, 140 L. Ed. 2d 62 (1998) (Petition, page 16). In *Lexecon*, this court held that an MDL transferee judge may not assign a case to himself for trial. This case involves a decision to transfer by the MDL Panel. It does not involve a decision of the transferee judge to assign a case to himself for trial. The Third Circuit took special note of *Lexecon* in its opinion. *Lexecon* has no applicability to the case at bar.

B. The Third Circuit Decision Did Not Conflict With Other Decisions

Petitioners assert that the Third Circuit decision "conflicts with numerous other decisions in the lower courts" (Petition, pages 16-25). No claim is made that there is a conflict among the circuits on the same important matter. In fact, no such conflict exists.

The principal factual predicate for this "conflict" claim is that all the common issues have already been decided. The Third Circuit is said to have "ignored these considerations" (Petition, page 18). The Third Circuit did not ignore these considerations. It expressly and correctly found that there remained many common issues of causation

and damages. It expressly took note of the vigorous dispute between the parties as to whether the trial court's determination on liability, warning, and punitive damages are binding on the entire class. To the extent that the petitioners' "conflict" claim rests on this factual predicate, it may be rejected on a threshold basis because the factual predicate is wrong.

Petitioners argue that the Third Circuit's decision conflicts with its own prior decision in *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir. 1996), *aff'd*, 521 U.S. 591 (1997) (Petition, page 19). Even if petitioners were correct, this would be a conflict within a circuit rather than a conflict between the circuits. But *Georgine* has nothing to do with the issues in this case. *Georgine* held in essence that class action certification rules may not be violated merely because it is a settlement rather than a litigation class. The Panel in this case did not pass on class certification. This case does not involve a settlement class. Petitioners also quote language from *Georgine* as well as respondent's prior papers in this case for the proposition that liability is generally regarded as a common issue whereas exposure and causation are generally regarded as individualized issues (Petition, page 19). These propositions are true but they do not advance the petitioners' case. Under a proper reading of the Fifth Circuit's opinion and its pretermission language, the common issues of liability have *not* yet been decided in the remaining *Cimino* cases. Even if these issues are regarded as having been decided, there remain common issues of causation and exposure. The fact that causation and exposure are individualized issues as to a particular plaintiff in a particular case does not mean that there are not areas of commonality in over two thousand cases of people (or various subgroups thereof) many of whom worked in the

same shipyards and refineries. Finally, the "common questions of fact" criteria of 28 U.S.C. § 1407(a) refers not so much to issues within a single case but to commonality between that case and all asbestos cases. The *Georgine* case is no authority whatsoever for the petition here.[11]

The petitioners rely on a catalogue of twenty eight cases (Petition, pages 20-25). The decisions of the Third Circuit and the Panel are said to "fly in the face" of these cases (Petition, page 20). *All* of them are prior decisions of the Judicial Panel on Multidistrict Litigation — the same body that is asserted to have abused its discretion here[12].

Five of the twenty eight cases are cited for the proposition that transfer should be denied when individualized issues predominate over common issues[13]. All

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11. The difficulties with class actions as pointed out in such cases as *Georgine* and *Ortiz v. Fibreboard*, 119 S. Ct. 2295 (1999) may make MDL proceedings more attractive. *See* 17 Moore's Federal Practice, 3d ed. § 112.02[2] in which it is suggested in a discussion which included a reference to *Georgine* that "multidistrict consolidation and transfer provisions have proven to be a useful alternative to class actions that could not otherwise proceed."

12. The purpose of the writ of certiorari is to resolve conflicts among the *circuits*. It is not the purpose of certiorari to re-examine fact specific differences between various JPML transfer decisions.

13. *In re Asbestos Schools Prods. Liab. Litig.*, 606 F. Supp. 713, 714 (J.P.M.L. 1985); *In re Deering Millikan Patent Litigation*, 476 F. Supp. 461, 464 (J.P.M.L. 1979); *In re United Gas Pipe Line Co. Litig.*, 391 F. Supp. 774, 776 (J.P.M.L. 1975); *In re Grand Funk Railroad Trademark Litig.*, 371 F. Supp. 1084, 1085 (J.P.M.L. 1974); *In re Air Crash Disaster Near Silver Plume*, 368 F. Supp. 810, 811 (J.P.M.L. 1973).

of these are original transfer denials by the Panel. They are highly fact specific and have virtually no relationship to *Cimino* — a "tag along" asbestos case. The original decision to transfer all asbestos cases was made eight years ago.

The remaining twenty three cases are cited for the proposition that transfer should be denied when the proceedings in the transferor court are well advanced. Sixteen of these cases involve original transfer denials and are thus dissimilar to *Cimino* for the reasons stated above[14]. Only six cases involved "tag along" situations and they are easily

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14. *In re Dow Chem. Co. "Sarabond" Prods. Liability Litigation*. 650 F. Supp. 187 (J.P.M.L. 1986); *In re Asbestos Schools Prods. Liab. Litig.*, 606 F. Supp. 713, 714 (J.P.M.L. 1985); *In re Rely Tampon Prod. Liab. Litig.*, 533 F. Supp. 1346, 1347 (J.P.M.L. 1982); *In re Ecuadorian Oil Concession Litigation*, 487 F. Supp. 1364, 1368 (J.P.M.L. 1980); *In re Insulin Mfg. Antitrust Litigation*, 487 F. Supp. 1359, 1361 (J.P.M.L. 1980); *In re Cable Tie Patent Litigation*, 487 F. Supp. 1351, 1354 (J.P.M.L. 1980); *In re Chiropractic Antitrust Litigation*, 483 F. Supp. 811, 813 (J.P.M.L. 1980); *In re McDonald's Franchise Antitrust Litigation*, 472 F. Supp. 111, 114 (J.P.M.L. 1979); *In re Womens' Clothing Antitrust Litigation*, 455 F. Supp. 1388, 1390 (J.P.M.L. 1978); *In re Ortho Pharmaceutical "Lippes Loop" Prods. Liability Litigation*, 447 F. Supp. 1073 (J.P.M.L. 1978); *In re Raymond Lee Organization, Inc. Secs. Litigation*, 446 F. Supp. 1266 (J.P.M.L. 1978); *In re Allen Compound Bow Patent Litigation*, 446 F. Supp. 248, 250 (J.P.M.L. 1978); *In re Helicopter Crash Near Cameron, Louisiana, on April 23, 1976*, 443 F. Supp. 1022, 1023 (J.P.M.L. 1978); *In re Southern Ry. Employment Practices Litigation*, 441 F. Supp. 926, 927 (J.P.M.L. 1977); *In re Westinghouse Elec. Corp. Employment Discrimination Litigation*, 438 F. Supp. 937, 939 (J.P.M.L. 1977); and *In re Luminex Int'l Prods. Liab. Litig.*, 434 F. Supp. 668, 669-670 (J.P.M.L. 1977).

distinguishable[15]. The last case is *In re Asbestos & Asbestos Insulation Material Prods. Liability Litigation*, 431 F. Supp. 906 (J.P.M.L. 1977). This decision is of no value whatsoever as it was effectively overturned and rendered moot by the Panel's decision thirteen years later in 1991. All of these cases are highly fact dependent[16].

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15. Transfer was denied in the Dalkon Shield cases because pretrial proceedings in the transferee district were either no longer active or "near an end", *In re A.H. Robins Co., "Dalkon Shield" IUD Prods. Liability Litigation*, 505 F. Supp. 221 (J.P.M.L. 1981) and 570 F. Supp. 1480 (J.P.M.L. 1983). In the *Midwest Milk Monopolization Litigation*, transfer was denied either because pretrial activities in one case in the transferor district were nearly completed and trial was imminent [441 F. Supp. 930 (J.P.M.L. 1977)] or because pretrial proceedings had been completed in the lead action in the transferee district and the lead action had been on trial for over two years [483 F. Supp. 823 (J.P.M.L. 1980)]. In *In re Four Seasons Sec. Laws Litig.*, 362 F. Supp. 574 (J.P.M.L. 1973), transfer was denied because discovery was completed in the transferor district. In *In re Motion Picture Licensing Antitrust Litig.*, 479 F. Supp. 581 (J.P.M.L. 1979), transfer was denied for complicated and unique reasons arising from the fact that discovery and pretrial proceedings were well advanced in the transferor district and the parties lacked interest in the common issues in the transferee district.

16. There is one case which is factually similar and which *does* support the transfer decision. *See Wilson v. Johns Manville Corp.*, 107 F.R.D. 250 (S.D. Tex. 1985), *aff'd on other grounds*, 810 F.2d 1358 (5th Cir), *cert. denied*, 484 U.S. 828, 108 S. Ct. 97 (1987), a large asbestos case consolidation which was transferred to Judge Weiner after trial and appeal on some issues but before the majority of individual cases were adjudicated. The pages of the docket sheet in *Wilson* indicating the MDL transfer were attached as an Exhibit in the record of this case in the Third Circuit. For an additional procedural ruling in *Wilson*, *see* 873 F.2d 869 (5th Cir. 1989).

There is no meaningful conflict between any other case and the Third Circuit and Panel decisions in this case. There is especially no conflict of sufficient importance to warrant the exercise of jurisdiction by this court.

C. The Third Circuit Decision Did Not Create a "Jurisdictional Conflict With the Eastern District of Texas"

Petitioners argue that the Third Circuit decision "pulled the rug out" from the Eastern District of Texas which had been preparing to try these cases; that the Third Circuit sustained its holding only by "directly repudiating" the Eastern District's decision on the preclusive effect of the Fifth Circuit's opinion; that no constructive purpose will be served by transferring these cases to the Eastern District of Pennsylvania (the MDL transferee court); that the convenience of the parties will not be served because the evidence is in Texas; and that neither justice nor judicial economy will be served by transferring these cases which have already lasted so long (Petition, pages 26-27). None of these arguments are meritorious.

The transfer order did not "pull the rug out" from the Eastern District of Texas. The District Court in Texas knew full well that MDL transfer proceedings were pending when it entered its Case Management order. After the decision of the Fifth Circuit on August 17, 1998, the Panel was notified of the status of the cases by letter dated October 21, 1998. The conditional transfer orders were entered on November 25, 1998. The Case Management Order of the District Court in Texas was dated one week later on December 2, 1998. That order made express reference to the pendency of the MDL proceedings and acknowledged that the Panel will have

to make a decision as to whether to transfer the cases. The final transfer decision was made on February 5, 1999. If the District Court in Texas was concerned about interference with its plans for trial preparation, it would have been a simple matter to wait for the Panel's transfer decision. This case did not "pull out the rug" any more than *any* MDL transfer.

The Third Circuit did not "directly repudiate" the prior decision of the Eastern District of Texas. At footnote 2 of its opinion, the Third Circuit expressly noted the vigorous dispute between the parties over whether the Eastern District's holding was the "law of the case" and concluded that it did not need to resolve that issue because transfer was otherwise appropriate.

Petitioner's argument that the convenience of the parties will not be served because the evidence is in Texas is a misstatement of the law. It well settled that the Panel looks not to the ease of travel and location of evidence in one case but to the more global questions of convenience in the litigation as a whole. *See* 17 Moore's Federal Practice, 3d ed. § 112.04[1][c] ["the Panel views the question of convenience from the group perspective rather than from the point of view of any one party or witness"]; *In re Sugar Industry Antitrust Litigation (East Coast)*, 471 F. Supp. 1089, 1094 (J.P.M.L., 1979); *In re Antibiotic Antitrust Actions*, 333 F. Supp. 299, 304 (S.D.N.Y. 1971). The Panel anticipated and addressed this precise issue in its 1991 decision, *In re Asbestos Liability Litigation (No. VI)*, 771 F. Supp. 415, 422 (J.P.M.L. 1991). The Third Circuit was correct to so hold.

Finally, petitioners argue that neither justice nor economy will be served by transfer. They characterize the transfer as a "delaying tactic" proposed by the defendant in response to pressure brought by the Eastern District of Texas to resolve these cases in a quick and expeditious manner (Petition, page 27). This argument represents a singularly one-sided view of justice and economy.

The question of whether a particular form of trial management serves justice and economy is highly subjective and factually individualistic in nature. Any evaluation of the justice and economy by which the Eastern District of Texas has historically managed these cases might well take into account the fact that *Cimino* trial plans have twice been invalidated by the Fifth Circuit on the grounds that they have acted outside the powers of the judiciary. In the view of the respondent, the not quite so just purpose of the *Cimino* plan was to so raise the stakes for defendants that settlements on plaintiffs' terms would become inevitable[17]. This was done by aggregating large numbers of cases, front loading the trial with punitive damages evidence and various evidentiary rulings which exaggerated the damages impact in individual cases. It was thus little surprise that *Cimino* produced what Judge Hogan's dissent in the Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation (Asbestos Committee Report) referred to as the "untoward results" of half million dollar verdicts in pleural cases when the same cases in most jurisdictions would merit only a few

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17. Almost all the original defendants in *Cimino* settled long ago with large payments to the plaintiffs — a phenomenon that should temper the present suggestion that justice delayed is justice denied.

thousand dollars[18]. The reason these cases have lasted so long is that the plaintiffs have been unwilling to relinquish the extraordinary windfall which the one-sided nature of the now reversed trial plan conferred on them. If the *Cimino* cases had been handled in a more conventional manner, they would have been disposed of long ago. Of all cases in the nation, *Cimino* is one of the least eligible for an exception to the MDL centralization regime on justice and economy grounds.

D. The Third Circuit Did Not Approve the Use of "Impermissible Factors as Reasons for Transfer"

Petitioners finally argue that the Third Circuit improperly made a reference to settlement in its transfer decision (Petition, pages 27-28).

This argument is a red herring. Petitioners have mischaracterized what the Panel actually said, incorrectly assumed that the transfer order deviated from the statutory standard, and mistakenly implied that settlements may not be an aspiration of MDL proceedings.

Petitioners imply that the Panel affirmatively and improperly utilized considerations of settlement in other cases to "interfere" with the progress of this case (Petition, page 27). That is not what the Panel said. The Panel's reference to settlement efforts was not an action-forcing rationale of its own but merely an identification of one of several issues which were either disputed by the parties or

18. In the proposed settlement class in *Georgine* (a settlement supported by some of the same attorneys representing the *Cimino* plaintiffs), pleural claims would receive *no* compensation. *See Georgine v. Amchem Products Inc.*, 83 F.3d 610, 620 (3d Cir. 1996).

which affected the overall management of the litigation. Having made this statement, the Panel went on to hold that Judge Weiner should be given an opportunity to review these elements and that remand procedures were fully available through MDL rules should this course of action prove advisable. Petitioners have attributed an "interference" motive to the Panel decision which is simply not there.

Petitioners have also incorrectly asserted that procedural rules have been "bent simply to promote settlements" (Petition, page 28)[19]. The Panel decision did not "bend" anything. The Panel's transfer decision was fully consistent with the transfer standards of 28 U.S.C. § 1407(a) and otherwise a totally proper exercise of managerial discretion.

Petitioners further appear to imply that settlements may not be a legitimate aspiration of MDL proceedings. This is a curious argument and one which should elicit disfavor from this court. One of the MDL 875's greatest successes is the large number of settlements it has produced in asbestos cases. Given the long history of *Cimino* and the fact that over 2,000 cases remain unadjudicated, settlements might well be of considerable benefit to the plaintiffs. To the extent that the Panel and/or the Third Circuit may have hoped that settlements become a product of the MDL process, their actions should hardly be the subject of rebuke by mandamus or certiorari.

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19. In support of this argument, petitioners cite the *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) and *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 625 (3d Cir. 1996). These decisions have to do with settlement classes. They have no applicability here where there has been no settlement class.

IV.

THESE CASES WERE PROPERLY TRANSFERRED UNDER 28 U.S.C. § 1407(a)

These cases were properly transferred pursuant to 28 U.S.C. § 1407(a).

A. The Cimino Case is a Paradigm for Multidistrict Proceedings

The Panel decision in this case was essentially a reaffirmation of its 1991 decision that all asbestos cases should be centralized in multidistrict proceedings. *See In re Asbestos Products Liability Litigation (No. VI)*, 771 F. Supp. 415 (J.P.M.L. 1991). The Panel's 1991 decision relied heavily on the Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation (Asbestos Committee Report). The Asbestos Committee Report repeatedly refers to the *Cimino* case by name as an example of the problems of asbestos litigation. There were many problems which gave rise to both the *Cimino* plan and the MDL centralization order. These include large numbers of cases, crowded dockets, complexity of issues, high transactional costs, repetitive liability evidence, and the potential exhaustion of the assets of the defendants.

Cimino, in short, is not a "case" in the traditional sense at all. Rather, it is a collection of thousands of cases and an experimental case management plan which has been twice overturned because it was beyond the powers of the judiciary. To the extent the *Cimino* plan is an attempt to "manage" asbestos cases, however, the Panel was well within its discretion to decide that multidistrict management

proceedings are appropriate, proper, and preferable. The Panel may well have been aware of *Cimino* when it entered its original centralization order in 1991 and it was undoubtedly exercising its proper management function when it held that what was left of the *Cimino* plan after the recent Fifth Circuit opinion belonged in the MDL. As such, *Cimino* is a paradigm for multidistrict proceedings. Any use of mandamus power to undercut the Panel's recent transfer order would be a serious blow to the 1991 centralization order itself and the procedure that has evolved to handle the asbestos docket in the federal courts for the last eight years.

B. The Cimino Case Meets the Standards for § 1407 Transfer

Under 28 U.S.C. § 1407(a), cases are appropriate for transfer when they involve one or more common questions of fact and transfer is determined to be for the convenience of the parties and the witnesses and will promote the just and efficient conduct of such actions. These criteria were met in this case. *Cimino* was a classic "tag-along action".

There are common questions of fact. If the respondents are correct about the meaning of the Fifth Circuit opinion, there are common issues of liability as well as causation and damages. If the petitioners are correct about the meaning of the Fifth Circuit opinion, there are many common issues of exposure and damages. There are certainly common features between the *Cimino* case and all the other asbestos cases which are routinely handled through MDL proceedings.

Transfer will serve the convenience of the parties and the witnesses. The convenience standard is applied to the litigation as a whole. The convenience standard was held to have been met in asbestos cases a long time ago.

Finally transfer will promote the just and efficient conduct of the litigation. This is a fact intensive inquiry which the Panel decided eight years ago and the Panel and the Third Circuit recently reiterated in this case. Judge Weiner's stewardship has resulted in the closing of 60,000 cases and the return of 1,000 to transferor districts. Mandamus should hardly be the response to this record of success.

CONCLUSION

The petition for writ of certiorari should be denied for all the above reasons. The writ of certiorari does not exist for the purpose of second guessing the factual basis of the lower courts when determining whether there has been an abuse of discretion in MDL transfers.

Respectfully submitted,

R. CORNELIUS DANAHER, JR.
Counsel of Record
DANAHER, TEDFORD, LAGNESE
& NEAL, P.C.
21 Oak Street, 700 Capitol Place
Hartford, CT 06106
(860) 247-3666

W. THOMAS MCGOUGH, JR.
REED, SMITH, SHAW, & MCCLAY
435 Sixth Avenue
Pittsburgh, PA 15219
(412) 288-3131

Attorneys for Respondent